

Protests of	)	
	)	Date: July 27, 1989
EQUIPMENT MARKETING CONSULTANTS)	)	
CORPORATION	)	
	)	
and	)	
	)	
PITNEY BOWES INC.	)	
	)	
Solicitation Nos. 119990-89-A-0144,	)	P.S. Protest Nos. 89-34,
-0145	)	89-42

### DECISION

Equipment Marketing Consultants Corporation (EMCC) and Piney Bowes Inc. protest the rejection of their bids under Solicitation Nos. 119990-89-A-0144 and -0145 to provide coin-operated photocopier services in the Tampa and Jacksonville, Florida divisions.

### Background

Solicitation Nos. 119990-89-A-0144 and -0145<sup>1/</sup> were issued by the Tampa Procurement & Materiel Management Service Office on February 24, 1989, with an offer due date, as amended, of March 27. The solicitations sought bids to provide coin-operated photocopying services in various locations throughout the Tampa and Jacksonville divisions. Paragraph 14 of the solicitations provided, in pertinent part, as follows:

To make an offer,<sup>1/</sup> you must:

\* \* \*

<sup>1/</sup>As the solicitations and relevant information were identical except for the area being served, we will refer to the solicitations together throughout this decision.

<sup>2/</sup>Although the solicitation referred to the broader term of "offer," it is clear from the protest file that these solicitations were advertisements for bids.

- c. Attach detailed information which clearly shows how your copiers meet each of [the] USPS's requirements (refer to **Copier Specifications** and **Safety**). Product brochures may not be sufficient for this purpose. You must include the wattage used in 24 hours by copiers without an automatic shutoff (this is for [the] USPS's information only and is not a part of the evaluation).
- d. Describe in detail your maintenance capabilities in the contract area.

\* \* \*

- g. Attach an inventory of copiers and coin devices on hand or being manufactured that enable you to furnish the required copiers.
- h. Attach your plan to get the necessary copiers and coin devices by the required dates, and any financing arrangements.
- i. Attach your plan for installing the copiers by the required date.

Four bids were received, with EMCC's bid offering the second highest commission and Pitney Bowes' the third highest. The contracting officer rejected all four bids as nonresponsive on May 18, and canceled the solicitation on the same day. EMCC was found to have been deficient in four areas: paragraph 14 c, in that its literature did not indicate whether the copiers it offered had a power on and off switch, ready and not-ready switch, and an internal copy counter; and paragraphs 14 g, 14 h and 14 i, in that it failed entirely to include with the bid copier inventories and plans for financing and installing the copiers. Pitney Bowes' bid was found to be deficient in two areas: paragraph 14 d, in that it provided a list of service locations in response to the request for its maintenance capabilities and paragraph 14 i, in that it stated that the copiers would be installed in accordance with the solicitation's delivery schedule but without setting forth an installation plan. These timely protests followed.

### EMCC's Protest

EMCC asserts that the contracting officer has canceled the solicitation without a compelling reason, as required by Postal Contracting Manual<sup>1/</sup> (PCM) 2-404.1. Citing

<sup>3/</sup>Photocopier solicitations continue to be procured under the PCM until a specific structured solicitation package is developed under the Procurement Manual. PCM 2-404.1 (a) provides, in pertinent part, as follows:

- (a) To preserve the integrity of the formal advertising competitive bid system, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.

several past decisions of our office,<sup>1/</sup> the protester states that the failure to have a cogent and compelling reason for canceling the solicitation is arbitrary, capricious, an abuse of discretion and harmful to the competitive bidding process. EMCC argues that the contracting officer's rejection of all bids pursuant to PCM 2-404.2<sup>1/</sup> is improper and unauthorized and that the use of PCM 2-404.2, which it asserts has a less stringent standard than PCM 2-404.1, is a facade to hide the fact that the contracting officer did not actually have a valid reason for canceling the solicitations.

EMCC further argues that the defects in its bid for which it was rejected are neither essential nor material, pursuant to PCM 2-404.2 (a) and 2-301,<sup>1/</sup> and that, because its bid met all the essential and material requirements of the solicitation, it was improperly rejected as nonresponsive. It notes that in identical procurements in Miami, FL and Dallas, Fort Worth, and Beaumont, TX, EMCC and Pitney Bowes have had bids considered and accepted based on the same bid information submitted and rejected on the present solicitations. EMCC states that its bid and accompanying material clearly indicated that the Panasonic copiers it would supply would meet all necessary

PCM 2-404.1 (b) lists eight examples where cancellation of the solicitation may be appropriate, such as inadequate, ambiguous or revised specifications, no further requirement for the supplies or services, unreasonable prices, or anticompetitive practices. A final category permits cancellation when it is clearly in the best interest of the Postal Service.

<sup>4/</sup>VNP Vending Corporation, P.S. Protest No. 87-107, March 31, 1988; Garden State Copy Company, et al., P.S. Protest No. 82-84, September 1, 1983; Mancone Trucking, Inc., P.S. Protest No. 80-61, January 21, 1981; Grant Rental, Inc., P.S. Protest No. 79-29, August 1, 1979.

<sup>5/</sup>PCM 2-404.2 provides, in pertinent part, as follows:

- (a) Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.
- (b) Any bid which does not conform to the specifications contained or referenced in the invitation for bids shall be rejected unless the invitation authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the invitation.

<sup>6/</sup>PCM 2-301 (a), (c) provides, in pertinent part, that:

- (a) To be considered for award, a bid must comply in all material respects with the invitation for bids so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing.
- (c) Bids should be filled out, executed, and submitted in accordance with the instructions which are contained in the invitation for bids. ...

specifications and that it provided sufficient information to indicate its compliance with all other elements of paragraph 14. Therefore, EMCC requests that the cancellation be overturned and award be made to it.

### Pitney Bowes' Protest

Pitney Bowes first claims that its response to the solicitation was adequate to assure the contracting officer that it would meet the solicitation requirements. It asserts that a bid can only be deemed to be nonresponsive if it limits or modifies the obligation of the prospective contractor to perform in accordance with the terms of the solicitation. Since Pitney Bowes did not take exception to or deviate from the terms of the solicitation its bid is responsive.

Second, Pitney Bowes states that, since it is the incumbent contractor at the sites covered under these solicitations, the actual experience the Postal Service has had with its performance makes any defects in its proposal minor, and, therefore, waivable.

Citing Donald R. Harrigill, P.S. Protest No. 75-67, September 22, 1975, Pitney Bowes notes that failure to furnish information in a bid which was specifically required by the solicitation does not necessarily make a bid nonresponsive if the bid clearly commits the bidder to meet the solicitation's material requirements. No other bidders would be prejudiced by Pitney Bowes' failure to provide all the required information because Pitney Bowes has committed to, and is required to meet the solicitation's requirements.

Paragraph 14's requirements are minor because the Postal Service knows that Pitney Bowes understands and will meet them.

Third, Pitney Bowes explains that it has routinely provided the same information on over sixty previous coin-operated photocopier solicitations without ever being rejected as nonresponsive. Pitney Bowes states that it relied on these numerous prior findings that its bids were responsive in preparing the bids on the instant solicitations and argues that the Postal Service is estopped from asserting that its bid is nonresponsive.<sup>7/</sup> Pitney Bowes requests that the contracting officer's determination that its bid was nonresponsive be overturned.

### Contracting Officer's Position

The contracting officer rejects the protesters' positions. He claims that the requirements of Paragraph 14 are material, and that the bidders' failure to conform to these essential requirements justified the rejection of their bids pursuant to PCM 2-404.2. Since he views the Paragraph 14 requirements as material, they cannot qualify as minor informalities under PCM 2-405. The solicitation was canceled pursuant to

<sup>7/</sup>Fink Sanitary Service, Inc., Comp. Gen. Dec. B-179040, January 29, 1974, 74-1 CPD & 36Coronado Technology, Inc., ASBCA No.

33,317, 88-3 BCA & 20,983; Lockheed Shipbuilding & Construction Co., ASBCA No. 18460, 75-1 BCA & 11,246.

PCM 2-404.1 (b) (viii) as in the best interest of the Postal Service because no responsive bids were received. The contracting officer states that he has reviewed the procedures involved in these solicitations and that they were in accordance with the PCM.<sup>1/</sup>

### Discussion

While we have been offered a wide variety of rationales to justify overturning the contracting officer's determination of EMCC and Pitney Bowes as nonresponsive, we consider one argument to be sufficient to sustain the protests.<sup>1/</sup>

The record here reflects confusion over the meaning of the terms responsiveness and responsibility. These "terms of art" have precise legal meanings:

For a bid to be responsive it must conform in all material respects with the invitation for bids. PCM '2-301. However, to be a responsible bidder, it must be determined after bid opening whether the bidder has the ability to perform according to the specifications. See Comp. Gen. Dec. B-185268, February 10, 1976, 76-1 CPD 85:

Where, however, the information or condition required relates, as here, to the ability of a bidder to perform any resultant contract, then the matter is properly classified as one concerning the responsibility of the bidder. Whether a bidder is to be considered responsible or not is for determination after the bid opening. Bow Industries, Incorporated, B-181828, December 12, 1974, 74-2 CPD 330.

The Lombard Company, P.S. Protest No. 76-40, August 5, 1976.

As to Gardiner's allegation that Avery is nonresponsive, we must note that the question of whether a bidder can comply with the specifications is a matter of responsibility and not responsiveness. See F.S. Payne Company, P.S. Protest No. 76-42, August 16, 1976. An excellent statement of that proposition is made in 49 Comp. Gen. 553, 556 (1970):

<sup>8/</sup>Additional comments were received from both protesters which restate their positions and note that the contracting officer has not made any specific response to the protests in addition to his initial position. A comment was also received from a prospective copier supplier, indicating that it possessed sufficient copier inventory to meet the requirements of the solicitations.

<sup>9/</sup>Our sustaining the protests for the reasons stated in this decision does not imply agreement with any other arguments made by the protesters.

...[T]he test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. Unless something on the face of the bid, or specifically made a part thereof, either limits or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, it is responsive.

Gardiner Trane Service Co., P.S. Protest No. 76-69, November 2, 1976.

L.P. Fleming, Jr. Hauling, Inc., P.S. Protest No. 83-64, December 19, 1983. The contracting officer rejected EMCC's and Pitney Bowes' bids based on items which deal with the ability of the offerors to perform the tasks required by the solicitation. It is undisputed that EMCC and Pitney Bowes did not qualify in any way their commitment to supply photocopiers which would meet the requirements of the solicitation. Therefore, the items for which the protesters' bids were rejected were matters of responsibility, not responsiveness.

Past decisions of this office have held that, when items of information required by the solicitation go to matters of responsibility, they may be supplied after bid opening and do not require a rejection of the bid as nonresponsive. See The Firestone Tire & Rubber Co., P.S. Protest No. 79-47, October 30, 1979; Comcorps, P.S. Protest No. 82-48, September 15, 1982; Elder Construction, P.S. Protest No. 82-41, August 13, 1982. This is so, even if the solicitation contains directive language which indicates that the information "must" or "shall" be included with the bid. See Comcorps, supra; Elder Construction, supra. The fact that EMCC and Pitney Bowes did not submit the information required by the solicitation in no way qualifies their obligation to perform the contract in accordance with its terms. Therefore, the contracting officer improperly rejected EMCC's and Pitney Bowes' bids as nonresponsive.

The appropriate remedy in this case would be to reinstate the solicitation and make award to the most advantageous, responsive, responsible bidder.<sup>10/</sup> Since the bids were erroneously rejected, there was no compelling reason to cancel the solicitation. The solicitation shall be reinstated and the offers submitted pursuant to it considered.

The protests are sustained.

William J. Jones  
Associate General Counsel  
Office of Contracts and Property Law

**[checked against original JLS 5/24/93]**

<sup>10/</sup>While we have before us only two of the four bidders whose bids were rejected we assume that, upon reinstatement of the solicitation, the contracting officer should consider all bids which were rejected for the reasons that this decision finds to be inadequate.

We are unable to give EMCC the relief it requests, award of the contract. See L.P. Fleming Jr. Hauling, Inc., supra. Such a decision rests upon determinations as to responsibility which are properly discretionary judgments of the contracting officer. Levi Carver, On Reconsideration, P.S. Protest No. 76-25, October 28, 1976.